No. 6168

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

R. E. WENIGER AND CHARLES BLOOM,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

PETITION FOR REHEARING

On Appeal from the District Court of the United States for the District of Idaho, Northern Division.

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Comes now the appellee in the above entitled cause and respectfully petitions the court for a rehearing of this case and for a setting aside of the opinion of the court in said case filed February 24th, 1931, upon the following grounds and for the following reasons, to-wit:

I

The opinion states:

> "The evidence, in our opinion falls short of showing that the particular conspiracy which was organized by the city officials of the village of Mullan was joined in by these appellants."

A reading of the opinion of the court indicates that perhaps the theory of the government as to the conspiracy, and of the connection of Sheriff Weniger and Deputy Sheriff Bloom therewith, in this case was not made clear, inasmuch as it is not discussed or even referred to. On page 28 of our brief in chief we said:

> "The government did contend in this case that where a State Prohibition Statute imposes a duty of enforcement on an officer, and that officer purposely did nothing in his office to enforce such statute, and at the same time knew of the open and continuous violations of prohibition laws, which acts were also violations of the Federal Prohibition Statutes, that this mere negative attitude on the part of such officer might become an affirmative act in furtherance of the conspiracy to violate the Federal Prohibition Statute, for if such officer knew of the conspiracy to violate the National Prohibition Act and purposely failed to perform his duty to prevent violations or apprehend violators of the State Prohibition laws, who were also violators by the same acts of Federal Prohibition Laws, this mere purposeful failure to perform his duty under the State Statute was a necessary circumstance to the continuance of the conspiracy, and gave aid and assistance to its contin-

> uance and success, and such officer thus assisting in such conspiracy by such conduct, became a co-conspirator,"

and this theory of conspiracy was founded upon an expression of the court in Burkhardt vs. U. S., 13 Fed., (2) 841:

> "the rule that acquiescence in or failure to prevent a conspiracy or criminal act is not sufficient to render one liable, does not apply in every circumstance to one whose duty it is under the law to prevent the act. His acquiescence may amount to purposeful furtherance; it may be the deliberate removal of an otherwise troublesome obstacle from the path of the law violator and thus become affirmative cooperation."

The only difference in the situations of Weniger and Bloom, sheriff and deputy, and the trustees, Harwood, Ristau, et al, and the local policeman Florin, Welch, Needham and Morphy, was that the activities and purposeful furtherance by acquiescence and failure to perform duties of the latter were confined to the village as their jurisdiction, while exactly the same type of purposeful activity and deliberate failure of duty of the former, with the same knowledge and purpose, was extended over the county, *including the village*. The field of the former was larger, but included the field of the latter—it gave greater opportunity, and made possible that the doing or refraining to do a particular act would be in aid not only of the liquor business throughout

the county but within the village. Thus acts or omissions of the sheriff and his deputy might—and did—assist not only the furtherance of the particular conspiracy in Mullan, but other conspiracies or independent liquor dealers elsewhere in the county. This is illustrated by acts of the sheriff and deputy in the Rogers-Cooper incident where, after disclosure of their official character to the sheriff and his deputy, Cooper immediately thereafter, could not buy liquor either in Wallace or in Mullan at places he had patronized up to the very time of that disclosure to those officials. The logical inference is that this "uncovering" by the sheriff and his deputy reacted to the benefit of the conspiracy in Wallace (which was charged in another indictment and the defendants therein convicted after trial) as well as to the benefit of the conspiracy in Mullan, by preventing or hampering the efforts of the Government in detecting violators of the National Prohibition Act. It doubtless also reacted to the benefit of other liquor dealers who were in the county, but not members of either conspiracy, by effectually removing Rogers and Cooper from further undercover investigation, but that fact would not preclude the act from being also in furtherance of the Mullan conspiracy.

That a conspiracy existed so far as the village officials and the liquor dealers, gamblers and prostitutes of Mullan are concerned was found by a Grand Jury, the trial court, the trial jury, and this court.

It could hardly be denied. Yet the activity and inactivity—the purposeful refraining from action so as to permit violation of the National Prohibition Act and with the obvious intent to encourage it—were no different by the village officials than by the sheriff and his deputy. True, money was collected by the former, but that it was collected was more evidence of unity, of agreement, of conspiracy, than of anything else. The conspiracy was not one to collect money—if it had been the government could not have prosecuted—but its essence was to deal, and permit the dealing, in liquor, the thing prohibited by United States laws, and to gamble, and permit gambling, and to ply the profession of prostitution, and to permit its operation. This also did the sheriff and his deputy, charged by the state laws with the same or even larger, duty than the village officers in suppression of these objects in view of which the words of the opinion that Weniger and Bloom "were outsiders with separate and distinct functions having to do not at all with the local business," and that the sheriff's action "applied to all parts of his county, and not in particular to the village of Mullan," are not supported. Rather it did apply in particular to the village as well as to all parts of the county, for Section 2640, Idaho Compiled Statutes, (a part of the Idaho Prohibition Act) says:

> "*Duties of Peace Officers*: It shall be the duty of all sheriffs, deputy sheriffs, constables, may-

ors, marshals and police officers of any city or village, having notice and knowledge of any violation of the provisions of this article, to notify the prosecuting attorney of the proper county of the fact of such violation and to furnish him the names of any witnesses within his knowledge by whom such violation can be proven. If any such officer shall fail to comply with the provisions of this section, he shall, upon conviction, be fined in any sum not less than $100 nor more than $500, and such conviction shall be a forfeiture of the office held by such person, and the court before whom such conviction is had shall, in addition to the imposition of the fine aforesaid, order and adjudge forfeiture of such office. For a violation or neglect of official duty in the enforcement of this article, any of the city or county officers herein referred to may be removed in the manner now or hereafter provided by law."

And Section 8314 Idaho Compiled Statutes (part of the anti-gambling statute), reads:

> "*Officers to enforce law.* Every prosecuting or county attorney, sheriff, constable, or police officer, must inform against and diligently prosecute persons whom they have reasonable cause to believe offenders against the provisions of this chapter, and every such officer refusing or neglecting so to do is guilty of a misdemeanor."

which statute has reference to the enforcement of the provision contained in Section 8307, Idaho Compiled Statutes, which reads:

> "*Gambling*: *Punishment.* Every person who deals, plays, or carries on, opens or causes to be opened, or who conducts, either as owner, em-

> ployee, or lessee, whether for hire or not, any game of faro, monte, roulette, lasquenet, rouge et noir, rondo, or any game played with cards, dice, or any other device, for money, checks, credit or any other representative of values, is guilty of a misdemeanor and is punishable by fine not less than $200 or imprisonment in the county jail not less than four months."

Furthermore, Chapter 209, Idaho Session Laws, 1921, provides:

> "That any unmarried person who shall have sexual intercourse with an unmarried person of the opposite sex shall be deemed guilty of fornication, and, upon conviction thereof, shall be punished by a fine of not more than $300 or by imprisonment for not more than six months or by both such fine and imprisonment; *Provided,* That the sentence imposed or any part thereof may be suspended with or without probation in the discretion of the court."

And Section 3596, Idaho Compiled Statutes, as amended 1921 Session Laws, page 547, provides:

> "The sheriff must:
>
> 1. Preserve the peace
> 2. Arrest and take before the nearest magistrate for examination, all persons who attempt to comit or who have committed a public offense. * * * "

The evidence showed that the sheriff and his deputy, just as the local police and trustees, had knowledge of liquor, gambling and prostitution in Mullan, frequented the same places during their illegal activity, gave the same kind of warnings of

threatened interference, failed in the same way to enforce the state law, when enforcement would have prevented or at least hampered Federal violations, condoned the violations, exposed Federal investigators, oppressed persons giving information of Federal violations to Federal officers, and in general, with the intent and purpose of permitting such violations and in furthering and aiding them, threw about the conspiracy a protecting arm.

The trial court instructed the trial jury upon this theory.

> " * * the essential elements of this offense are two: first, the act of conspiring to commit an offense against the United States, and, secondly, the doing by one or more of the parties to the conspiracy of an act to effect the object of the conspiracy (Tr. 773) * *
>
> " * * A concerted action to violate the law is usually secret and is ordinarily shown by separate, independent acts, each tending to support and establish a common design and purpose on the part of those aiding and participating in such acts. This common design and purpose is the essence of the crime of conspiracy. * * The jury will be justified in inferring the existence of a conspiracy if the government satisfies you beyond a reasonable doubt by the testimony of credible witnesses that any two or more of the persons named in the indictment aimed by their acts to accomplish the same unlawful purpose or object, one performing one part thereof and the other or others another part of the same, so as to complete it, the acts of each ever leading to the same unlawful re-

sult, although the parties so participating may never have met together to concert the means or to give effect to the unlawful design and purpose. * * (Tr. 775)

" * * Mere knowledge, acquiescence or approval of the act without cooperation or agreement to cooperate is not enough to constitute one a party to a conspiracy. There must be intentional participation in the transaction with a view to the furtherance of the common design and purpose * * " (Tr. 776)

(Then, after cautioning the jury that they must find beyond all reasonable doubt, and that circumstantial evidence must be consistent with guilt and inconsistent with every other reasonable conclusion:) * *

"A conspiracy may have a number of objects * * The only object of the claimed conspiracy in this case over which the United States and its courts have any jurisdiction is the one set forth in the indictment, namely, a conspiracy to commit violations of the National Prohibition Act." (Then the reason for admissibility of matters relating to gambling and prostitution is explained, and the jury cautioned with respect to the consideration thereof). "With respect to the defendants R. E. Weniger and Charles Bloom * * I instruct you that these defendants are not on trial for a mere failure to enforce the prohibition laws, state or national, in the village of Mullan or in the county of Shoshone. *These defendants are not accused of acts of omission but of commission, namely, that they entered into the conspiracy described in the indictment to violate the prohibition laws*

of the United States in the particulars set forth in the indictment.

"But, gentlemen of the jury, in this connection I instruct you that where individuals are the occupants of a public office or offices and whose duties in whole or in part require of them the enforcement of the liquor laws and the arrest of those engaged in such law violation, and it is made to appear that within the jurisdiction of such offices, such laws are openly notoriously and continuously violated in such manner and under such circumstances *that the jury is satisfied beyond all reasonable doubt that such peace officers in fact knew of such flagrant, open and continuous violations*, if you find there were such, and that such officers did little or nothing to enforce the laws that were being violated by arresting those engaged in their violation. These are facts and circumstances which you have a right to take into consideration together with all the other facts and circumstances disclosed by the evidence in the case as shedding light on *whether or not such peace officers, or any of them, actually joined the conspiracy charged in the indictment and aided and permitted its execution.* In such circumstances *you should inquire whether such acquiescence* in such law violation, if you find there was such, *was due to mere negligence, inefficiency, incompetency or inability to perform the public duties devolving upon such officer or officers, or was the conduct passive and intentional with full knowledge of a conspiracy to bring about such violation and was passed with a view and for the purpose of protecting and aiding it.* In other words, *was the inaction or acquiescence*, if any, *due to a mere failure of duty, or was it a passive refraining from per-*

forming the duty with the knowledge of the violations for the purpose of aiding and assisting in the conspiracy to violate the laws which were being violated?

"*Mere lack of diligence in the performance of their duties on the part of public officers is not enough. There must in addition be proof of knowledge of facts showing an intention* on the part of the officers in question *to aid in the unlawful act by refraining purposely from doing that which they were by their duties of their office bound to do, with the intent* and *for the purpose of becoming a party to and aiding in the execution of a conspiracy to violate those laws.* This you must determine by your verdict in the light of all facts and circumstances disclosed by the testimony in the case." (Tr. 778-781)

" * * While the defendants are jointly indicted and are being jointly tried, it is your duty nevertheless, to consider and apply the testimony to each defendant separately and to determine the guilt or innocence of each defendant as the result of so considering and applying the evidence to him or her * * ."

The trial court was convinced that there was sufficient evidence under this theory to go to the jury, and denied a directed verdict (Tr. 764); and the trial jury found the sheriff and his deputy to be in the same position as the village trustees and police, and, under the very careful instructions of the court, that the actions and inactions of the sheriff and deputy were deliberate and intentional for the purpose of aiding and furthering the conspiracy—it

found them guilty. Was there not substantial evidence upon which the jury might so conclude? Should the trial court have directed a verdict because of the lack of substance in the evidence?

In th case of Allen v. U. S., 4 Fed. (2d) 688 (7th C. C. A.) it is said:

> "A conspiracy may be established by circumstantial evidence, *or by deduction from facts.* The common design is the essence of the crime, and *this may be made to appear when the parties steadily pursue the same object, whether acting separately or together, by common or different means, but ever leading to the same unlawful result.* If the parties acted together to accomplish something unlawful, a conspiracy is shown, even though individual conspirators may have done acts in furtherance of the common unlawful design apart from and unknown to the others. All the conspirators need not be acquainted with each other. They may not have previously associated together. One defendant may know but one other member of the conspiracy. But, if knowing that others *have combined to violate the law, a party knowingly cooperates to further the object of the conspiracy, he becomes a party thereto.*"

Taking the theory of the prosecution and the trial court and the rule laid down in the case last cited, could not reasonable minds deduce from the facts that the sheriff and his deputy steadily pursued the same object as the other defendants, ever leading to the same unlawful result? That the jury, the final arbiter of the facts and conclusions to be drawn

therefrom, did so conclude is evidenced by their verdict.

Bloom was a resident of Mullan, and familiar with it for years, and frequenter of the many places engaged in open violation of the law; Weniger knew his deputy's history, was a frequent visitor to the village, and visited the places violating the law; each knew that men convicted by the Federal government of liquor violations in Mullan and confined thereunder in the jail in charge of Weniger and Bloom, had returned to Mullan and again engaged in business places of the character where the liquor law was being violated. Each knew, as was the common repute, that Mullan was "wide open"; that Federal officers were making arrest after arrest through the years. Here was a small village, not a large city, in which there was not one or two places operating, but almost every other door in a business district of a block and a half, doing a large liquor business for years. The sheriff not only failed to take any action himself, but refused to cooperate with Federal officers, and objected to their activity and to the cooperation given by others. Money was taken by Bloom, and association was shown in the sheriff's re-election. Is the deduction to be drawn from these facts any weaker than that drawn from less facts by this court in Marron v. U. S., 8 Fed. (2d) 251 in which the government's theory was identical, as to

police, with the theory in this case, and expressed by this court as

> "The government's contention is that they (the police) became parties to the conspiracy by the corrupt receipt of money and *by securing the other defendants against interference by the police.*" (In determing that there was joinder in the conspiracy by the police this court excluded consideration of the receipt of money—see page 257).

There a single flat was operated for 17 months in a large city a half block from a police station, as a saloon doing a large business. From this alone this court said:

> "The circumstances suggest a corrupt understanding with men in the police force as an indispensable condition to the continued operation of the business."

How much more logical is the conclusion in this case that the circumstances suggest a corrupt understanding, a conspiracy, with the police and officials of Mullan, and even with the sheriff and the deputy, as an indispensable condition to the continued operation of numerous wide open street level saloons in a tiny village, saloons with open swinging doors, from which odor of liquor came out into the streets, and into which from the streets anyone could look upon the drinking at the bar.

Again this court held the policemen properly convicted in the Marron case *though not a single affirmative act in aid of the conspiracy appears from*

the opinion. Gorham, sergeant of police, on instructions that the place was a bootleg joint, visited it, was denied the right to search, knew the bartender, reported the place as a residence, saw a drink taken there; Kissane, policeman on the beat, suspected the flat, went through the rooms, found no evidence, visited the place twice a week and never saw evidence of bootlegging, saw whiskey glasses and empty liquor bottles, and the occupant told him he was a bartender. A ledger made by another person indicated payments to Gorham and Kissane. This Court said:

> "The jury must have concluded from the testimony of other witnesses that the flat was fitted up with all the facilities for the sale of liquor. * *
>
> "The Court did not err in holding that there was prima facie evidence that Gorham and Kissane were parties to the conspiracy." * * *
>
> "If the evidence shows a detail of facts and circumstances in which the alleged conspirators are involved, *separately* or *collectively*, and which are clearly referable to a preconcert of the actors *and there is a moral probability that they would not have occurred as they did without such preconcert*, that is sufficient, *if it satisfied the jury* of the conspiracy beyond a reasonable doubt. Daws v. U. S., 107 F. 753."
>
> "The evidence against Gorham and Kissane was sufficient to take the case to the jury, *and it was for the jury to say whether it satisfied them* beyond a reasonable doubt."

In the Marron case conviction of police seems to have been sustained on account of knowledge, opportunity, and failure to act, supplemented by entries in a ledger kept by other conspirators who were liquor dealers. In this case every one of those conditions existed and far more, for in this case affirmative acts in aid of the conspiracy were shown. Bloom personally warned McGill of impending Federal raids. Bloom and Weniger, after McGill gave information to Federal officers investigating this very Mullan conspiracy, accused him of helping the government and warned him to stay out of the joints; on the arrest of Barron by Bloom and Weniger, for an alleged assault, Barron's note book with records of purchases of liquor in Mullan was taken and Barron admonished against giving information and threatened with deportation, and other prisoners allowed to beat him up; when raids were made by Federal officers, Weniger objected to deputy sheriffs from other counties assisting them; when McCreary told Bloom of liquor conditions in Mullan and asked him why he didn't close the places up, Bloom replied that he was not running the County; that he had to do as he was told; and the next day Weniger, with Bloom, visited McCreary's father, told him the son was sassy and if he didn't stop it, they would arrest him; Bloom warned the McCrearys to close up, the Federals were coming in; and most significant was the Rogers-Cooper incident. The latter were investi-

gating the Mullan and Wallace conspiracies, working under cover. While their identity was known to some people in the county, nevertheless Cooper during all the time he was working in Mullan and Wallace *until uncovered by Bloom and Weniger*, was able to frequent the liquor joints, observe liquor sold, and to buy liquor himself. But within 15 minutes of the time his, and Rogers', identities were disclosed to Bloom and Weniger, he was refused admittance to the very places in Mullan and Wallace where as late as the night before he had been a welcome patron.

In this case there was not only deliberate failure to prevent liquor violations, which the jury found, under instructions from the trial court, was with the intent and purpose to join the conspiracy and in aid of it, but there was deliberate obstruction of Federal enforcement in the village itself with intent and purpose to aid the conspiracy and under the Allen, the Burkhardt, and the Marron cases:

> "The evidence * * * was sufficient to take the case to the jury, and it was for the jury to say whether it satisfied them beyond a reasonable doubt." (Marron v. U. S., 8 Fed. (2d) 251, 258).

The most effective help that the officers could give to the accomplishment of any crime would be inaction, that is, by failing to do his sworn duty to apprehend the criminal, upon a prior agreement with the criminal that he would not apprehend him.

What better aid to a bank robber than his knowledge that the policeman on the beat, knowing of the contemplated crime, would not interefere—would do nothing. It would seem that to say that when an officer purposely gives that kind of help which is essential to the carrying out of the conspiracy by removing an obstacle to it, that he is not guilty would be saying that it is impossible for an officer to be guilty of joining such a conspiracy unless he actually engages in the traffic himself. —The jury found (1) that Bloom and Weniger knew of the existence of the conspiracy, (2) that they purposely and with the intent of aiding and assisting the accomplishment of its objects refrained from doing their duty (the most that they could do) and in this manner joined the conspiracy. Certainly the facts justified the finding of the jury. It would seem that the question in its final analysis is whether or not an officer can join in and participate in a conspiracy by *purposely refraining from* enforcing the law and thus intentionally aiding the accomplishment of the objects of a conspiracy? If he can, then surely in light of the jury's verdict, the appellants are guilty.

II

The opinion states:

> "The cross examination of appellant Bloom, respecting his knowledge of the prevalency of gambling in Mullan had no reasonable relation to the charge being investigated * * These facts

> were not relevant to the question as to whether the appellants had engaged in the conspiracy to violate the National Prohibition Act in the Village of Mullan as the Indictment charged and the admission of the testimony was error."

The logic of this conclusion escapes us, especially in view of the express holding of the opinion that

> "Competency was claimed for this evidence (of gambling and prostitution conditions and payments) on the ground that the assorted vice was so intermingled with the business of liquor selling that it could not be separated. In the main this was probably so as affecting the actions of the village officials."

While the object of the conspiracy which permitted the United States to intervene was that of violation of the National Prohibition Act, yet it clearly appears that that was not the sole object. The conspiracy was a general one, relating to various forms of law violation, having as its objects, not only the fostering and carrying on of the liquor business, but also the violation of state laws by the fostering and carrying on of gambling and prostitution. The conspiracy was a single one—its objects were many but inextricably interwoven—the same place engaged in dealing in liquor also engaged in gambling, or in prostitution; payments were made for both; the same individual engaged in one or more; collections for all were made at the same time, by the same means, by the same persons, and entries made upon the same subscription list, and reported in one re-

port to the same trustees. One standing by and observing one could observe the other, the businesses being carried on within the same room. The prostitute dealt in liquor, the gambler dealt in liquor, the liquor dealer ran a gambling game, and all joined together with officials to effectuate the common purposes.

In the government's case these objects and their inter connection had been shown, and also had been shown Bloom's association with the persons and places involved, as well as his activity, and lack of activity, knowing the conditions, with respect to such objects which the single conspiracy sought to accomplish. Under these conditions Bloom took the witness stand and upon his direct examination told of his visits to the various places and what he saw or did not see there.

"I have had occasion to go around the county into the various poolrooms and social places and soft drink places on business. I collect the pool table license the first month of each quarter for the county and state. I collected * * at Le Gores * * Bilberg Hotel * * Miners Club * * Victor Hotel * * Mullan Pool Hall * * Yellowstone Cigar Store * *. As to the other places that have been mentioned in this testimony, I had no license collections to make there. * * I only went into these places when I was looking for somebody * * I did not for any other purpose or any other occasion (Tr. 720-721). * * I went into the

Bolo looking for parties * * I went to the Bilberg Hotel several times to find a certain fellow I wanted to serve with some papers. I went to Le Gores * * When I was in these places during these periods I did not see any liquor, did not see any being drunk or sold; did not see any liquor brought or taken out (Tr. 722) As deputy sheriff it became necessary for me to ascertain the addresses of people at times and to go into these various hotels in Mullan. The hotels then were the Central Hotel, Bilberg Hotel, Victor Hotel and Stevens Hotel. I never saw liquor sold in any of these various places in Mullan. (Tr. 725)."

In other words on his direct examination he told of visiting places, especially the Bilberg and the Central, which had already been shown by the government to be gambling and liquor joints connected with the conspiracy and participating in two of its objects, liquor and gambling, and told why he went there, what he did there and what he saw or did not see there. It then certainly became proper in view of the scope of the conspiracy, and in view of his own direct testimony, to cross examine relative to his purpose in going into these places, what he saw and what he did, and his attitude of mind toward law violations therein in his presence, and his investigation or lack of investigation thereof. It was proper not only because of the three fold objects of the conspiracy and the association of one object with another, and because also of his own direct examina-

tion, and because also of what he must have been able to see, had he desired, of the open handling of liquor there described in the government's case, but becaus his inability to see gambling before his eyes, or to take any official action respecting it, was a test of his credibility in denying that he had seen or was aware of liquor violations therein, and of his statement on direct (Tr. 723) "Nobody has ever sold or handled liquor in my presence that was not apprehended," as well as indicative that his attitude toward one of the objects of the conspiracy, gambling, would likely be the same toward another object, namely, the selling of liquor. And prior to the matter held objectionable, he had, on cross-examination, without objection, gone into some detail with respect to part only of the activities of these places. And without objection he also described the bars in the Bilberg and his failure to observe any liquor (Tr. 726-729; 732); he further testified to his knowledge of arrests thereat for liquor, his failure to investigate, and his inquiries regarding it, which in view of the conditions theretofore shown, were incredible (Tr. 733-738). The same is true of the other places where gambling was mentioned in cross-examination.

In addition the Court very carefully instructed the jury relative to this evidence:

> "I charge you, however, that the only object of the claimed conspiracy in this case over

which the United States and its courts have any jurisdiction is the one set forth in the indictment, namely, a conspiracy to commit violations of the National Prohibition Act. *A conspiracy with respect to gambling or prostitution, or any of the ordinary forms of municipal vice, if confined to such places, would not be a conspiracy to commit an offense against the United States for the reason that the United States and its courts have no jurisdiction with respect to gambling, prostitution, and municipal vice.*

"The only object of the claimed conspiracy which you may take into account in arriving at your verdict in this case is the object alleged in the indictment, namely, that the parties conspired to violate the National Prohibition Act in the respects enumerated and set forth in the indictment.

"The testimony in this case with respect to gambling and prostitution in the village of Mullan was admitted because it was so interwoven with the charge of violating the laws of the United States, namely, the prohibition laws, that it was competent for you to take it into consideration in connection with all the other facts and circumstances disclosed by the evidence in the case as a shedding light on the question of whether there was a conspiracy to violate the prohibition laws, if in your judgment such evidence has any such effect. * * * (Tr. 778, 779).

"In conclusion, gentlemen of the jury, I admonish you that in arriving at your verdict you must be guided solely by the evidence and instructions of the court in accordance with the solemn oath which you have taken. There is no place in your deliberations for prejudice or bias

or sympathy or sentiment. Let your verdict be impartial and fair—fair to the Government and fair to the defendants charged with a violation of its laws." (Tr. 791)

We respectfully submit that the petition for rehearing should be granted and the judgment of the lower court affirmed.

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I hereby certify that in my judgment the above petition for rehearing is well founded and that it is not interposed for delay.

.....

Attorney for the United States.